Kluwer Arbitration Blog

2024 in Review: Key Developments in the Netherlands

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Following the Blog's tradition of "year-in-review" series, this post reflects on the key arbitration developments in the Netherlands in 2024. What emerges from this review is the Netherlands' strong arbitration-friendly culture, notably reflected in the release of the 2024 Netherlands Arbitration Institute ("NAI") Arbitration Rules and a pro-arbitration stance in court decisions. However, a notable legislative challenge may affect the Netherlands' standing in international arbitration.

New NAI Rules

The NAI, the largest general arbitration institute in the Netherlands, launched its new arbitration rules at the beginning of the year with the aim to make arbitration "Better, Faster, Greener!". Significant global and arbitration-specific changes have both occurred since the release of the previous set of rules in 2015. The amendments brought with the 2024 NAI Arbitration Rules have been made in a spirit of modernisation by addressing contemporaneous concerns such as transparency, efficiency, or sustainability.

Among the most notable changes, it is worth highlighting the obligation to include in the Claimant's request for arbitration (Article 8(2)(k)) and the Respondent' short answer (Article 9(2)(f)) the names of third-party funders. Considerations such as avoiding conflicts of interest and enhancing trust in the arbitration process have prompted other institutions to adopt similar mandatory disclosure requirements (i.e., 2020 International Court of Commerce ("ICC") Arbitration Rules and 2025 Singapore International Arbitration Centre ("SIAC") Arbitration Rules).

The new rules introduce several efficiency enhancements to streamline arbitration proceedings. Indeed, the new NAI Case Management Committee is empowered to directly appoint an arbitrator when the parties fail to do so (Article 15(2)(d) and (e)), abandoning the previously "list procedure" mechanism. Additionally, the rules establish strict deadlines notably for case management conference, the first procedural order, and the final award (Articles 26(1) and (3), and 46), addressing the arbitration users' concerns about inefficiency.

Moreover, the new rules enlarge emergency proceedings to proceedings seated outside the Netherlands (Article 41). It incorporates the concept of Dutch summary proceedings (*kort geding*), allowing parties to obtain an enforceable award without initiating proceedings on the merits—contrasting with the ICC framework.

While the new rules draw inspiration from other arbitral institutions and do not substantially deviate from the previous framework, their release marks a significant and welcomed development in arbitration in the Netherlands.

Caselaw Reinforcing the Netherlands' Pro-Arbitration Stance

Respecting Party-Autonomy for Arbitration

Early in 2024, the District Court of Amsterdam addressed whether parties facing an unclear arbitration agreement could seek national court intervention, illustrating how to "Mind the Gap." The agreement referred to an arbitral institution as an "arbitration agency," citing the American Arbitration Association ("AAA") and the American Dispute Resolution Center ("ADRC") as examples and stated that "arbitration hearings" would occur in Bridgeport, Connecticut.

One party sought to initiate arbitration before the NAI, which the other party contested in a letter, arguing arbitration could only occur in the United States. Instead of pursuing NAI arbitration, the former filed for summary proceedings under Article 1074d of the Dutch Code of Civil Procedure ("DCCP"). The Court found the clause ambiguous but declined jurisdiction and upheld that the ambiguity should not have prevented the Claimant from initiating arbitration proceedings at the NAI or at any other suitable arbitration institutions. The decision underscores the importance of clear drafting in arbitration agreements and the courts' willingness to uphold arbitration clauses whenever possible.

The Supreme Court of the Netherlands (the "Supreme Court") recently addressed the question "Can the Agreement to Mediate Prior to Commencing Arbitration Be Binding?". While the Supreme Court did not provide a definitive ruling, it noted that multi-tiered dispute resolution clauses *may* impose an obligation on parties to attempt mediation before proceeding to arbitration or litigation. The binding nature of such clauses ultimately depends on their interpretation on a case-by-case basis.

Arbitral tribunals retain full discretion in handling these mediation clauses. Notably, an arbitral tribunal can stay proceedings to allow parties to engage in mediation, but only if the parties explicitly request it as such action cannot be taken *ex officio*. Furthermore, this procedural decision of the arbitral tribunal to stay or not stay the proceedings is not subject to annulment or setting aside by national courts.

Judicial Support with Minimal Interference

Recently, the Court of Appeal of Amsterdam granted leave to enforce an arbitral award despite the absence of the original arbitration agreement or a duly certified copy thereof (for previous coverage, see here). Under Article IV(1) of the New York Convention, a request for recognition and enforcement must be accompanied by both a duly authenticated original award (or a duly certified copy) and the original arbitration agreement (or a duly certified copy).

In this case, despite the absence of the required original arbitration agreement or duly certified copy, the Court of Appeal of Amsterdam adopted a flexible approach to the formalities prescribed

by the New York Convention. Reflecting the pragmatic Dutch legal mindset, the court emphasised that the defendant had not disputed the existence or content of the arbitration agreement amid the arbitration proceedings.

This decision provides reassurance to parties that, as long as the court is satisfied with the existence and validity of both the award and the arbitration agreement, minor non-compliance with formal requirements will not necessarily preclude the enforcement of an arbitral award.

In another instance, the Court of Appeal of Amsterdam also reaffirmed its pro-arbitration approach by granting leave to enforce a foreign ICC award, despite allegations of fraud and ongoing annulment proceedings in France. This serves as an example of how parties can smoothly be "Navigating Exequatur" through Dutch waters.

Regarding the alleged violations of Dutch and international public policy based on substantive and procedural fraud, the court emphasised the need for judicial restraint in its review to prevent the enforcement process from becoming a second bite at the apple.

- Concerning substantive fraud, the Court clarified that under Dutch law, this ground is limited to fraud discovered after the issuance of the award, which was not applicable in this case.
- Concerning procedural fraud, the Court noted that the arbitrator had considered and dismissed the respondent's request to reopen the case, adhering to ICC rules. This refusal did not amount to a breach of the adversarial process or the principle of equality of arms.

The Court also stressed that the initiation of annulment proceedings at the seat of arbitration does not obligate domestic courts to suspend enforcement. It added that it was noteworthy that the attempt to stay enforcement before the Paris Court of Appeal during the setting-aside proceedings had failed.

Ensuring the Integrity of the Arbitration Process

Early in December 2024, the Supreme Court upheld three decisions from the Court of Appeal of The Hague (ECLI:NL:HR:2024:1807; ECLI:NL:HR:2024:1810; ECLI:NL:HR:2024:1813), while one case was referred to the Court of Appeal of Amsterdam (ECLI:NL:HR:2024:1812). These cases pertain to Russia's effort to set aside a series of arbitral awards rendered under the Bilateral Investment Treaty ("BIT") between Ukraine and Russia.

Entities such as Naftogaz and PrivatBank claimed compensation for unlawful expropriation of investments in Crimea following Russia's annexation of this region in 2014. Russia sought to set aside the partial awards, arguing notably the lack of jurisdiction of the arbitral tribunals, the inapplicability of the BIT following the annexation of Crimea, and the violation of public policy due to alleged fraud amid the arbitral proceedings.

The Supreme Court decisions are significant as they reaffirm the applicability of investment treaties to disputed territories, emphasising the principle of effective control regardless of sovereignty disputes. These decisions highlight the legitimate role of arbitration in resolving complex disputes and underscore the narrow criteria under Dutch law for setting aside arbitral awards on public policy grounds.

Another decision rendered in 2024 by the Court of Appeal in The Hague also demonstrated the stringent criteria needed to set aside arbitral awards under Dutch law. The Court of Appeal dismissed Bolivia's attempt to set aside an International Centre for Settlement of Investment Disputes (ICSID) award based on a BIT between Bolivia and Spain. The application relied on four of the five grounds for setting aside under Article 1065 of the DCCP, including:

- The absence of a valid arbitration agreement: Bolivia sustained that the tribunal lacked jurisdiction due to a provision in the contract with the investor requiring disputes to be submitted to Bolivian domestic courts. This agreement predated the BIT. The Court held that upon the BIT's entry into force, Bolivia had consented that investors could submit alleged violations of rights granted by the treaty to arbitration, and that the arbitration agreement was therefore established by the submission of the investor's request for arbitration.
- The lack of authority to issue an expropriation order: the Court clarified that Bolivia had misinterpreted the tribunal's decision. The decision awarded monetary compensation rather than ordering nationalisation.
- The insufficient justification relating to damages: the Court ruled that Bolivia's dissatisfaction with the tribunal's reasoning did not equate to insufficient justification, as the tribunal had provided sufficient reasoning to support its conclusions.

Annulment and Setting-Aside Proceedings Unavailable for False-Negative Jurisdictional Arbitral Rulings

Despite the Netherlands' arbitration-friendly stance, its judiciary and legislative framework adopt a restrictive approach toward recourse to setting-aside proceedings when an arbitral tribunal wrongly declines jurisdiction. This position leaves parties in a precarious state, without access to justice if court proceedings are not a viable alternative. Following the Supreme Court's decision in the *Manuel Garcia Armas et al. v. Venezuela* case demonstrating "Asymmetrical Avenues for Annulment" under Dutch law, the Supreme Court reaffirmed this stance by rejecting an appeal seeking annulment of an arbitral award in which the tribunal declared itself incompetent.

This approach diverges from practices in other European jurisdictions, such as France, where awards in which the arbitral tribunal has incorrectly refused jurisdiction can be set aside by state courts. Dutch arbitration practitioners have expressed a clear desire for legal reform. As a prominent seat of arbitration, notably home to the Permanent Court of Arbitration in The Hague, this stance has raised concerns among users. Indeed, this approach hinders access to justice—not only due to the procedural deadlock it creates but also because it may deter third-party funders from supporting such proceedings, given the heightened risks involved. While ambitious and unlikely, Dutch arbitration practitioners certainly hope such a change will feature in next year's Kluwer Arbitration Blog Year in Review.

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